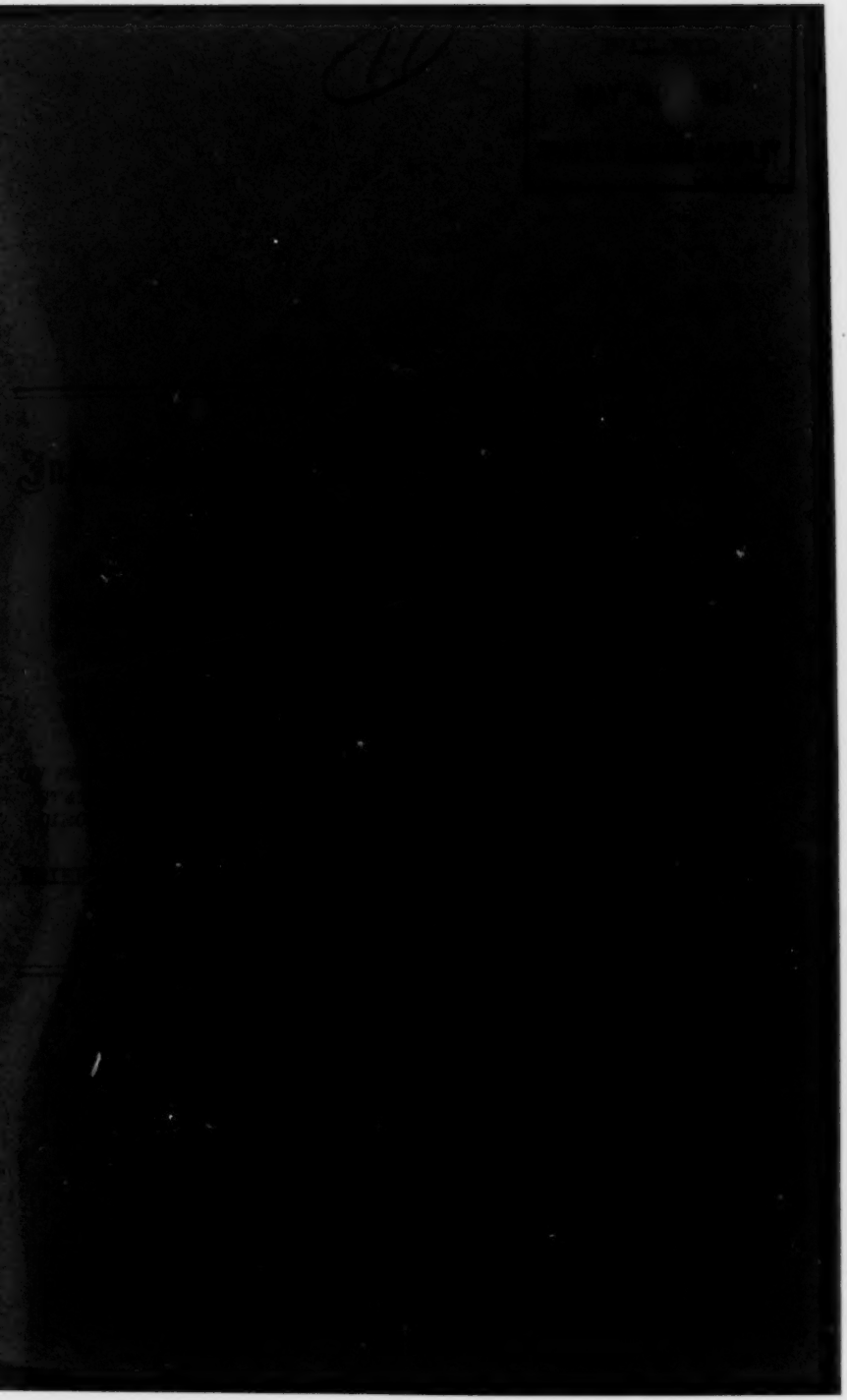

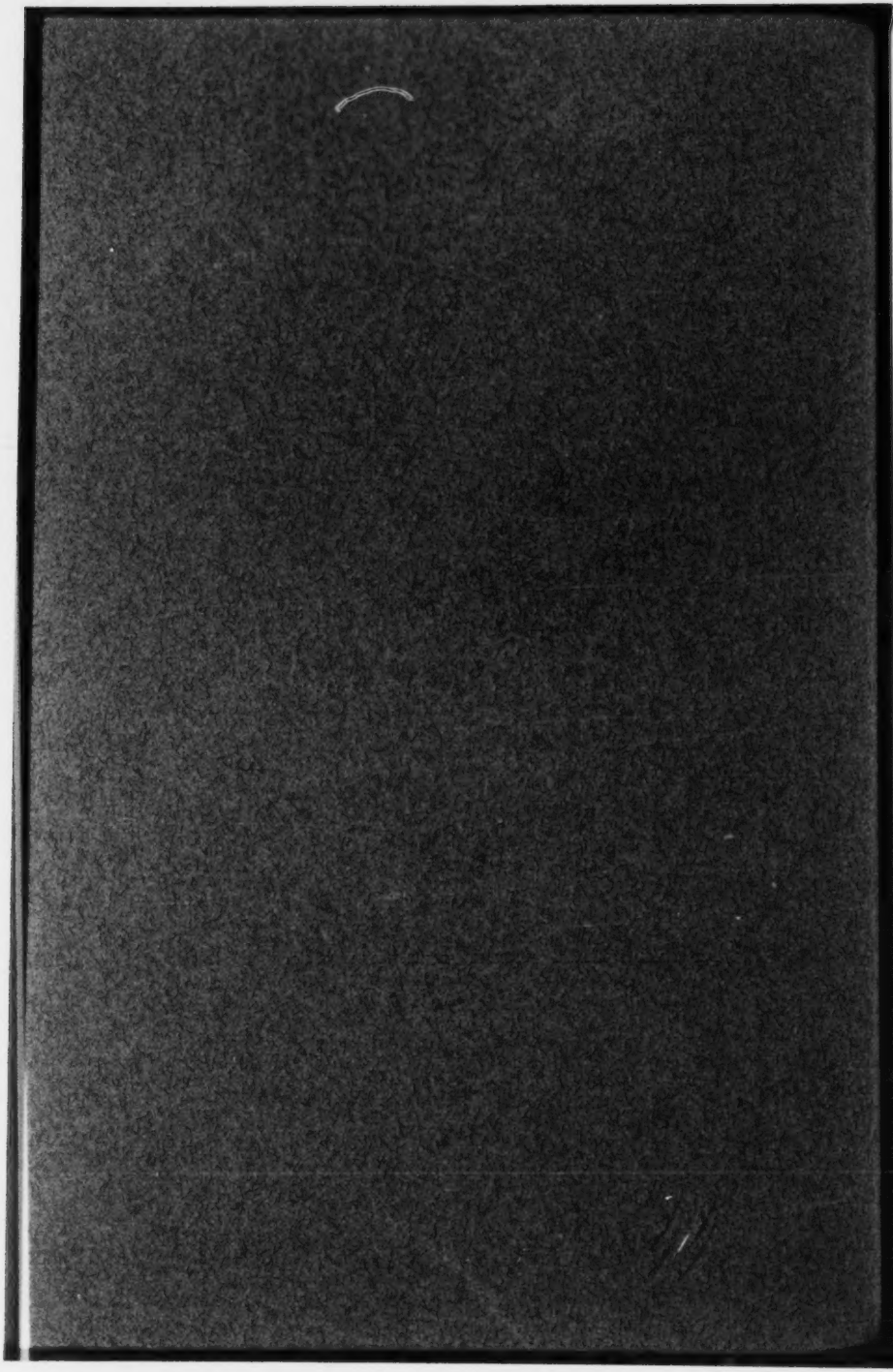

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320603—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 513–517) is reported in 116 F. (2d) 586. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 475–504) are reported in 19 N. L. R. B. 648.

JURISDICTION

The decree of the court below (R. 518–520) was entered on February 8, 1941. The petition for a writ of certiorari was filed on May 8, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether under Section 9 of the National Labor Relations Act, the National Labor Relations Board may validly certify as the exclusive representative of the employees a labor organization which received a majority of the votes cast, but less than a majority of those eligible, in an election in which a majority of those eligible voted.

2. Whether, in the circumstances of this case, the Board abused its discretion in refusing to permit a representative of the employer to be present at the election.

3. Whether there was substantial evidence to support the Board's findings that employees laid off by petitioner during a seasonal slack period, but who would normally be returned to work upon the resumption of regular operations, retained an employee status so as to entitle them to vote in the election.

4. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

On February 11, 1938, in proceedings under Section 9 of the Act in which petitioner and United Automobile Workers of America, Local No. 338, herein called the Union, participated and as to which no question is raised, the Board issued its Decision and Direction of Election (R. 38–47). Therein the Board found that a question affecting commerce had arisen concerning the representation of petitioner's employees (R. 41–42), determined the appropriate unit (R. 42–44), and directed that a secret ballot election be conducted by its Regional Director (R. 47). On February 21, 1938, petitioner moved for permission to have a representative present at the election (R. 48–49); the Regional Director denied the motion (R. 54–55).

The election was held on February 24, 1938 (R. 56). Thereafter, the Regional Director issued a report stating that the results of the election were as follows (R. 56):

Total number eligible to vote	407
Total number of ballots counted	330
Ballots in favor of the Union	175
Ballots against the Union	155
Void ballots	2
Challenged ballots	9

The Regional Director recommended that the Union be certified as exclusive bargaining representative (R. 56–57). Petitioner filed objections and exceptions to the election and to the report thereon (R. 57–59). On June 10, 1938, after a

hearing on the objections and exceptions before a trial examiner (R. 61–128), the Board certified the Union as exclusive representative of the employees within the appropriate unit (R. 128–133).

On August 10, 1938, the Board upon charges and amended charges filed by the Union pursuant to Section 10 of the Act (R. 133–135), issued a complaint against petitioner alleging that petitioner had violated Section 8 (1), (3), and (5) of the Act by refusing to bargain collectively with the Union despite the latter's certification by the Board as exclusive representative of the employees, by terminating the employment of certain employees because of their union membership and activity, and by other acts of interference, restraint, and coercion (R. 136–141). On January 19, 1940, following a hearing and other usual procedural steps under Section 10 of the Act, the Board issued its decision setting forth its findings of fact, conclusions of law, and order (R. 475–504). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

Petitioner manufactures and sells ball bearings and is extensively engaged in interstate commerce (R. 479–480, 499; 162–164). Immediately preceding a "consent" election[2] held on August 21, 1937,

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[1] The references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] A "consent" election is one arranged through agreement of the parties; it is not directed, nor does it result in a formal

to determine whether petitioner's employees desired to be represented by the Union for collective bargaining purposes, Martin Peterson, a foreman, warned various of the employees that the plant would be shut down if the Union were successful (R. 488, 207, 224–225, 226–228), and Leonhart, assistant superintendent of the plant, questioned Anderson, the secretary-treasurer of the Union, concerning his activity in and other affairs of the Union (R. 488–489; 341–342, 372–373). After the certification of the Union as exclusive representative on the basis of the Board-directed election held on February 24, 1938 (*supra*, pp. 3–4), petitioner admittedly refused to recognize and bargain collectively with the Union (R. 485–488; 150–151, 165–166, 175–177, 267–270, 338–339). During the course of a seasonal decline in business, petitioner laid off Winans and Anderson, president and secretary-treasurer of the Union, respectively (R. 494, 497; 233, 183–184). In view of the fact that Anderson and Winans were the leading figures in the

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certification by the Board under Section 9 of the Act. While its results are frequently accepted as evidence of majority in a later case, the Board gave no effect to the consent election in this case because "a large number of employees who would otherwise have done so failed to vote on account of delay in the opening of the polls," and because "the employees who were eligible to vote at the consent election differ somewhat from the employees in the unit which we find appropriate for collective bargaining purposes" (R. 45–46, 483).

Union, that Anderson had been warned against certain union activities, and that in both cases petitioner disregarded its normal practice in reducing and recalling personnel,[3] the Board found that the lay-offs were discriminatory (R. 496, 498).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 488, 489, 496–497, 498–499, 500–501), and ordered petitioner to cease and desist therefrom, to bargain collectively with the Union, to offer reinstatement with back pay to Winans and Anderson, and to post appropriate notices (R. 501–504).

In February 1940 petitioner filed in the court below its petition to review and set aside the

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[3] In determining the individuals to be laid off in a particular department, petitioner customarily went over the list of its employees in the department involved and considered their ability, efficiency, productiveness, willingness, the number and kinds of jobs each was trained to do, and, all other things being equal, seniority and the number of their dependents. The employee who by these tests seemed of least value was then laid off. In addition, as a means of retaining the services of exceptionally valuable employees, petitioner would sometimes transfer such employees from a department where they were not needed to another department in which less valuable men were working; the least valuable employee in that department was then laid off. When additional labor was needed, the same procedure was followed in deciding which of the laid-off employees should be reinstated (R. 491; 81, 280–287, 304–305, 314, 317, 343–346).

Winans' value as a worker was equal to that of two other workers, Peterson and Perry, who were retained in the

Board's order (R. I–VI); the Board requested enforcement (R. VI–X). On January 6, 1941, the court handed down its decision enforcing the Board's order, with modifications not here material (R. 513–517). A decree was entered accordingly on February 8, 1941 (R. 518–520).

ARGUMENT

1. The court below held that the Board's certification of the Union as exclusive bargaining representative was valid and that petitioner accordingly was under a duty to bargain collectively with that organization. The various grounds urged by petitioner to justify its refusal to honor the certification are without merit and present no questions warranting review.

(a) Petitioner contends (Pet. 9, 15–18) that the certification of the Union is invalid because the total vote it received was less than a majority of those eligible to vote, although those voting constituted a majority of those eligible and the Union

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department, and was also equal to that of another workman, Greene, who was transferred from another department to take Winans' place (R. 494–496; 231, 235–237, 244, 395, 418–422). Seniority and the number of dependents should, therefore, have been the determinative factors. If applied, Winans, who was released, would have been retained (R. 491–495; 213, 235–236, 241, 302, 317–319, 390).

Anderson was a more valuable workman than Echlund, a fellow employee, since Echlund was laid off before Anderson (R. 498; 206, 395). Nevertheless Echlund was recalled before Anderson, who had not been reinstated at the time of the hearing (*ibid.*).

received a majority of votes cast. The contention is contrary to the decision of this Court interpreting the comparable provisions of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515. It has likewise been rejected by the two other Circuit Courts of Appeals which have interpreted the majority rule provisions contained in Section 9 (a) of the National Labor Relations Act. *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. (2d) 474, 477–478 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, No. 493, this Term. The question whether a certification may validly issue when less than a majority of eligible voters participate in an election, which petitioner seeks to import into this case (Pet. 16–17), is not presented;[4] a majority of those eligible voted (*supra,* p. 3).

(b) The holding of the court below (R. 515–516) that the Board did not abuse its discretion in refusing to permit representatives of the employer to be present at the polls during the election is in accord with the only other decision upon the question. *Southern Steamship Co.* v. *National Labor Relations Board,* decided May 6, 1941 (C. C. A. 3d). While the presence of employer representatives may prove helpful to the repre-

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[4] That question was present in the *New York Handkerchief* case, *supra.*

sentatives of the Board conducting the election in determining the eligibility of the voters, their presence may, even where not intended, have the effect of inhibiting the employees so that the election results do not reflect the free and independent choice contemplated by the statute. Accordingly, as a general rule, the Board has not allowed employer representatives to be present at the polls unless the labor organization involved consents. *Third Annual Report of the Board* (1938), p. 147.[5] This procedure was particularly appropriate in this case in view of evidence that at a consent election previously held the employees had voiced their apprehension at the presence of employer representatives (R. 26–31). Moreover, petitioner has shown no prejudice, although at the hearing held after the election (R. 61–128) it had full opportunity to challenge the conduct of the election. In these circumstances, the propriety of the exercise of the Board's discretion does not present any question calling for review.

(c) Petitioner challenges (Pet. p. 21–24) the finding of the Board that, for purposes of eligibility to vote at the election, employees who had been laid off because of a seasonal slack in produc-

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[5] Employer representatives were not permitted to be present at elections conducted by the old National Labor Board which administered Section 7 (a) of the National Industrial Recovery Act. Lorwin & Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 159–161. See also, *First Annual Report of the National Mediation Board* (1935), p. 4.

tion, but who would normally be recalled upon the resumption of regular operation, retained their employee status and had an interest in the election (R. 131–132, 483–484).[6] The court below sustained the finding (R. 516–517.)[7] The evidence amply supports the concurrent holdings of the Board and the reviewing court upon this issue of fact. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461.

It is undisputed that it has been petitioner's established practice to recall to work as production increased employees theretofore laid off because of fluctuations in petitioner's highly seasonal operations (R. 20, 25, 80–85, 91, 179–180, 218, 219–223, 228–230, 296–298, 314–317, 337–338, 351–352, 374); that it was petitioner's intention to adhere to that practice in this instance (R. 78–79, 86–91), that for this purpose petitioner retained a list of the names of the employees laid off (R. 76–79, 81–83);

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[6] The Direction of Election provided that employees "on the pay roll as of September 24, 1937, excluding those who have since quit or been discharged for cause" were eligible to vote (R. 47). The Board and the court below construed the term "discharge for cause" as encompassing only those who were finally discharged for fault, not those who were merely laid off because of seasonal business fluctuations (R. 132, 516).

[7] Only two of the 114 men in this category who voted were shown to have obtained equivalent positions with other employers; the court below held that they should have been considered as having quit petitioner's service, but that "throwing out their ballots would not change the result of the election" (R. 516–517).

and that, until this case, petitioner had always used the term "lay-off" rather than "discharge" to describe the result of such a seasonal reduction in force (R. 374).[8] Upon this evidence it is plain that the Board could find as a fact that such a reduction did not completely sever the employment relationship and that the employees so laid off retained an interest in the outcome of the election sufficient to warrant their participation. See *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, 82 (C. C. A. 9), certiorari denied, 310 U. S. 632, and *Nashville C. & St. L. Ry.* v. *Railway Employees Department,* 93 F. (2d) 340, 342–343 (C. C. A. 6), certiorari denied, 303 U. S. 649.[9] The finding is further supported by the decision of this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 219. That petitioner had a "legal right" (Pet. pp. 22–23) not to return the men to work is not material.[10]

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[8] See also R. 3–4, where petitioner, in an answer to another and earlier complaint of the Board, alleged that workers similarly released were not discharged, but merely laid off, and would be recalled "as soon as business conditions warranted."

[9] The *North Whittier Heights* case is closely in point. See the Board's opposition to certiorari in that case, pp. 16–19.

[10] The employer enjoyed the same right with respect to the seamen in the *Waterman* case. And, although the employees in the *Nashville* case retained seniority rights, there was no legal obligation to return the men to active work; the Court expressly noticed that the men might "never again be employed" (95 F. (2d) at 342).

2. The contention (Pet. 24–24) that the Board's findings on the issue of discrimination against Winans and Anderson are not supported by substantial evidence presents no question for review in view of the concurrent holdings of the Board and the court upon the fact issue. *National Labor Relations Board* v. *Falk Corporation, supra.* Further, the evidence summarized in the Statement (*supra,* pp. 5–7) affords adequate support for the findings.

CONCLUSION

The decision below is correct, no question of importance is presented, and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

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